No. 14,865

IN THE

United States Court of Appeals

For the Ninth Circuit

WESLEY LEON COLBERT,
Appellant,

vs.

PAUL J. MADIGAN, Warden, United States Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

This Court has jurisdiction of this appeal under Sections 2241 and 2253 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant is a prisoner in the United States Penitentiary at Alcatraz, California. On May 13, 1955 appellant petitioned for a writ of habeas corpus on the ground that respondent had misinterpreted the terms of the judgment under which he was committed. This judgment order, insofar as pertinent here, reads as follows:

> "It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years, said sentence to run consecutively with the sentence imposed by this court in criminal action No. 15127."

An order to show cause was issued on May 23, 1955. Subsequently, respondent made return to this order and a hearing was held before the Honorable Edward P. Murphy, United States District Judge. Judge Murphy discharged the order to show cause and denied the petition for a return of habeas corpus. Appeal was timely made to this Court.

OPINION OF THE COURT BELOW.

"This is a petition for a writ of habeas corpus, alleging illegal detention because of the expiration of the sentence. Petitioner was convicted in the United States District Court for the Eastern District of Arkansas, Western Division in two criminal actions, No. 15127 and No. 15298. On October 15, 1951, petitioner was sentenced to a term of five years in action No. 15127 and to an additional term of five years in action No. 15298. On the order in action No. 15298, the sentencing court said:

> 'It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years, said sentence to run consecutively with the sentence imposed by this court in criminal action No. 15127.'

"Petitioner contends that since the sentencing court did not specify the date of commencement of the second sentence, and used the words 'consecutively with', the two sentences should be construed as concurrent. This contention is invalid. It is the clear rule in this Circuit that 'consecutively with' is equivalent to 'consecutively to'. *Butterfield v. Wilkinson,* 215 F.2d 320 (9th Cir. 1954). There is no ambiguity in the sentence here. It is plainly meant to be consecutive to the sentence in action No. 15127.

"NOW THEREFORE, GOOD CAUSE APPEARING THEREFOR, it is ordered that the order to show cause heretofore issued be, and it is hereby discharged, and that the petition for a writ of habeas corpus be, and it is hereby DENIED.

"Dated: June ....., 1955.

"/s/ Edward P. Murphy
"United States District Judge"

QUESTION PRESENTED.

Does the use of the preposition "with" instead of the preposition "to" following the word "consecutive" operate so as to create a concurrent rather than a consecutive sentence?

ARGUMENT.

Appellant argues that his commitment for escape should be interpreted as imposing a concurrent

sentence "to" the sentence imposed for the interstate transportation of a stolen motor vehicle. A similar contention was made in the case of *Lipscomb v. Madigan,* No. 14,730, in the Court of Appeals for the Ninth Circuit, decided June 27, 1955. There, as here, the preposition "with" was used instead of the preposition "to". The Court held, however, that the judgment was sufficient to impose a consecutive sentence. In *United States v. Daugherty,* 269 U.S. 360, the Supreme Court said that while "sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehension by those who must execute them. The elimination of every possible doubt cannot be demanded."

In *Butterfield v. Wilkinson,* 215 F.2d 320 (9th Cir. 1954), this Court stated "as respects the use of the phrase 'consecutively with' rather than 'consecutively to,' it seems to us that for all practical purposes one manner of putting it is as clear as the other."

In the instant case appellant's only point is the use of a preposition. What is involved here is not the propriety of the sentencing court's grammar but what the court fairly intended in its judgment. In criminal sentences the word "concurrently" means that a prisoner should serve his sentences at the same time. The word "consecutively", on the other hand, means that the sentence should begin to run at the expiration of the other sentences referred to in the judgment. In *Martini v. Johnston* (9th Cir.), 103 F.2d 597, cert. denied, the judgment read, after

imposing concurrent sentences on Counts One through Eight, "on Count 9 the sentence to run *consecutively with* the sentence on Counts One to Eight." (Emphasis added.) This Court of Appeals held that the proper interpretation of the sentence on Count Nine was "to run consecutively with the sentence on Counts One to Eight". The Supreme Court declined to review the Ninth Circuit interpretation. In the *Martini* case this Court expressly held adversely to the contention made here. The ruling in the *Martini* case should not be overruled.

There can be no more basic distinction in criminal sentencing than that between the word "consecutive" and the word "concurrent". When a court uses the word "consecutive" the sentence should be interpreted to run consecutively. A contrary interpretation would be to construe the sentence contrary to the clear intendment of the sentencing court. The judgment should be affirmed.

Dated, San Francisco, California,
October 7, 1955.

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